



## The President's Unconstitutional Treaty-making

David H. Moore

### ABSTRACT

The President of the United States frequently signs international agreements but postpones ratification pending Senate consent. Under international law, a state that signs a treaty subject to later ratification must avoid acts that would defeat the treaty's object and purpose until the nation clearly communicates its intent not to join. As a result, the President in signing assumes interim treaty obligations before the treaty-making process is complete. Despite the pervasiveness of this practice, scholars have neglected the question of its constitutionality. As this Article demonstrates, the practice is unconstitutional. Neither the text, structure, nor history of the Constitution supports the practice. Nor can the practice be justified under the President's authority to enter sole executive agreements or as a longstanding practice in which Congress has acquiesced. The result, ironically, is that the President often acts unconstitutionally when employing the treaty-making process outlined in Article II of the Constitution. Yet the President need not avoid the Article II process to cure this constitutional defect. The President avoids constitutional violation by consenting to international agreements through means other than signature subject to ratification.

### AUTHOR

David H. Moore is Professor of Law at the J. Reuben Clark Law School, Brigham Young University.

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## INTRODUCTION

Article II of the U.S. Constitution authorizes the President to make treaties “provided two thirds of the Senators present concur.”<sup>1</sup> The President often signs treaties long before the U.S. Senate concurs. Indeed, many of the most prominent treaties of our day have been signed by the executive but remain unapproved by the Senate: the Kyoto Protocol;<sup>2</sup> the First and Second Additional Protocols to the Geneva Conventions;<sup>3</sup> the International Covenant on Economic, Social, and Cultural Rights;<sup>4</sup> the Convention on the Rights of the Child;<sup>5</sup> and the Convention on the Elimination of All Forms of Discrimination Against Women,<sup>6</sup> among others.<sup>7</sup> Sometimes the lag between signature and ratification is substantial; these treaties were signed in the 1970s, ’80s, and ’90s.<sup>8</sup> International law, in both its treaty and customary dimensions, provides that in the interim between presidential signature and ratification, signature triggers an international obligation to avoid actions that “would defeat the object and purpose of [the] treaty” until the United States makes clear its intent not to

1. U.S. CONST. art. II, § 2, cl. 2. For a detailed description of the treaty-making process, see THOMAS M. FRANCK, MICHAEL J. GLENNON & SEAN D. MURPHY, *FOREIGN RELATIONS AND NATIONAL SECURITY LAW* 353–59 (3d ed. 2008).
2. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 148 (signed by United States Nov. 12, 1998), *available at* [http://treaties.un.org/pages/ViewDetails.aspx?src=UNTS&tabid=2&cmdsg\\_no=XXVII-7-a&chapter=27&dang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=UNTS&tabid=2&cmdsg_no=XXVII-7-a&chapter=27&dang=en).
3. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 (signed by United States Jan. 23, 1979), *available at* <http://treaties.un.org/pages/showDetails.aspx?objid=08000002800f3586>; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 (signed by United States Jan. 23, 1979), *available at* <http://treaties.un.org/pages/showDetails.aspx?objid=08000002800f3cb8>.
4. International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (signed by United States Oct. 5, 1977), *available at* [http://treaties.un.org/pages/ViewDetails.aspx?src=UNTS&tabid=2&cmdsg\\_no=IV-3&chapter=4&dang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=UNTS&tabid=2&cmdsg_no=IV-3&chapter=4&dang=en).
5. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (signed by United States Feb. 16, 1995), *available at* [http://treaties.un.org/pages/ViewDetails.aspx?src=UNTS&tabid=2&cmdsg\\_no=IV-11&chapter=4&dang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=UNTS&tabid=2&cmdsg_no=IV-11&chapter=4&dang=en).
6. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (signed by United States July 17, 1980), *available at* [http://treaties.un.org/pages/ViewDetails.aspx?src=UNTS&tabid=2&cmdsg\\_no=IV-8&chapter=4&dang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=UNTS&tabid=2&cmdsg_no=IV-8&chapter=4&dang=en).
7. Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT’L L.J. 307, 309 & n.5 (2007).
8. See *supra* notes 2–6; see also Bradley, *supra* note 7, at 309.

ratify.<sup>9</sup> The result is that the President, in signing subject to ratification, assumes treaty obligations before completing the constitutional processes for creating international agreements.<sup>10</sup>

This problem has received little attention in the literature.<sup>11</sup> Most who have addressed the issue have done so in passing. Some have concluded that the President's assumption of interim obligations is constitutional due, for example, to historical practice. Others have suggested the opposite, though none has fully engaged the issue. Indeed, the most fulsome analysis notes "tension" between interim obligations and Article II but does not focus on establishing the unconstitutionality of the assumption of interim obligations.<sup>12</sup>

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9. Vienna Convention on the Law of Treaties art. 18, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. Article 18 provides in full:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

- (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
- (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

*Id.* For ease of reference, this Article occasionally refers to these obligations as "article 18 obligations," recognizing, of course, that some nations, like the United States, incur these obligations as a matter of customary international law.

10. Similar problems arise when the executive fails to submit to the Senate for its consent reservations proposed by our treaty partners, *see* CONG. RESEARCH SERV., 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 16–17 (Comm. Print 2001) [hereinafter CRS, TREATIES], and when a treaty applies provisionally before the United States has completed the constitutional process for expressing consent, *see id.* at 113–14; *see also* Vienna Convention, *supra* note 9, art. 25; *infra* note 365. While these phenomena are not the focus of this Article, this Article's analysis transfers. It is not so obvious, however, that this Article's analysis applies to executive acceptance of the procedural provisions of a treaty (addressing such things as how and when consent may be expressed). *See, e.g.*, Vienna Convention, *supra* note 9, art. 24(4) ("The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text."); J. MERVYN JONES, FULL POWERS AND RATIFICATION 86, 87, 89 (1949) (noting that "[s]ignature brings the formal clauses of the treaty . . . into immediate operation"). Because it is accepted that the President ultimately must express U.S. consent to a treaty, perhaps the President has unilateral authority to agree to at least some of the conditions under which consent will be given. *See infra* notes 32, 101 and accompanying text. Other conditions, such as those governing entry into force, arguably affect the United States only after Senate or congressional consent has been given and thus may not present the problem of executive assumption to the same extent that interim obligations do.
11. *See infra* Part I.
12. Bradley, *supra* note 7, at 308, 330, 334 (noting "tension"); *id.* at 319 (noting "constitutional issue"); *id.* at 327 (noting "potential constitutional conflict"); *id.* at 334 (noting "constitutional concerns");